Supreme Court, U.S.
FILED
MAY 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1638

IN THE

Supreme Court of the United States

October Term, 1988

PG PUBLISHING COMPANY, t/a THE PITTSBURGH POST-GAZETTE, a corporation,
Petitioner,

vs.

RICHARD DISALLE and JOAN DISALLE, his wife,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA.

REPLY BRIEF OF PETITIONER

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Stripped of hyperbole, respondents' Brief in Opposition presents few points even worthy of response. To the extent that respondents' legal position is discernible at all, it would appear to be that the Post-Gazette failed to preserve the issues it now raises before this Court.

The simplest answer to this assertion is found in the appellate opinion below. The Superior Court clearly deemed it necessary to confront and decide all of the issues presented in this Petition. Nor was that court reticent about dismissing arguments that it felt had been waived. *See* A. 65a-66a. Surely, had the Post-Gazette failed to adequately preserve its positions below, the Superior Court's opinion could have been considerably shorter and would have generated no dissent at all.

Three specific points of rebuttal, however, are merited.

1. The common law privilege to report on judicial proceedings is not co-extensive with the privilege of neutral reportage.

As the Post-Gazette pointed out in its original Petition (p. 6, n. 2), the jury was instructed on a common law privilege that the trial court labelled as "fair comment." That instruction, the full text of which is set forth at A. 104a-105a, was intended to protect the Post-Gazette from liability for reporting on a "judicial proceeding" so long as the report was a "fair abridgement" of that proceeding.

As respondents concede, however, the Post-Gazette also requested an additional instruction that would have protected an "accurate and disinterested" report of "serious charges" made against Richard DiSalle (a public figure) by the will contestants. This instruction, which described the privilege of "neutral reportage," was refused.

There are significant distinctions between these two privileges, distinctions all the more important given the facts of this case. Respondents have repeatedly stressed, for example, that the portion of Robert Ciaffoni's deposition excerpted in the article "had never been used or referred to at the trial." Brief in Opposition, p. 2. *See also id.,* at 3. Surely a rational jury could have found that the Post-Gazette's quotation of that deposition was privileged as neutral reportage, even though it played no role in the judicial proceeding itself and therefore might not qualify for the common law privilege.

Similarly, while the common law privilege requires a newspaper to publish a "fair abridgement" of the entire proceedings, the privilege of neutral reportage requires only an accurate and disinterested rendition of the fact that certain serious charges have been made against a public official by an identified accuser. Again, a rational jury could have concluded that the Post-Gazette accurately reported Robert Ciaffoni's accusations even though it might not have presented an abridgement of the judicial proceedings themselves. As the trial court itself noted, it was not the Post-Gazette's purpose to "synthesize the proceedings in Washington County." A. 110a. Unfortunately, the trial court failed to recognize that such a synthesis was not the only format in which Robert Ciaffoni's charges might permissibly be reported.

In sum, the Post-Gazette requested, and was entitled to receive, instructions on both the common law privilege of "fair comment" and the constitutional privilege of neutral reportage. Given the facts of this case, no one can say, as a matter of law, that the failure to give the latter instruction did not affect the outcome.

2. There has been no finding that the Post-Gazette did not make an "accurate and disinterested" report of Robert Ciaffoni's charges.

In asserting that the Post-Gazette's article was neither accurate nor disinterested, and therefore could not qualify as neutral reportage as a matter of law, respondents confuse the issue of truth with the issue of accurate reporting. They consistently characterize the relevant portions of the article as "Petitioner's accusations" and "Petitioner's statements about DiSalle[.]" Brief in Opposition, pp. 10-11.

The important issue, of course, is not whether Mr. Ciaffoni's accusations were true or false, but rather whether the Post-Gazette reported those accusations in an accurate and disinterested fashion. In this regard, it should suffice to note that the Post-Gazette quoted the actual exchange between DiSalle's own attorney and Robert Ciaffoni, complete with its nuances and qualifications:

> [Q.] Now you tell me what has been told to you by other people which to you is an indication of sexual intimacy between Richard DiSalle and Elizabeth Cowden?
>
> [* * *]
>
> [A.] I'm sorry, your [*sic*] misstating my position. I said they were by themselves for extended periods of time and were observed by other people and that it could develop into that. That's all I am telling you.

A. 78a. In any event, while the trial court did suggest that the article "was not an attempt to dispassionately report on a legal proceeding in Washington County," A. 115a-116a, no court has concluded, or could conclude,

that the Post-Gazette did not, as a matter of law, report Robert Ciaffoni's charges in an accurate and disinterested manner.

Here again, it is important to note that the Superior Court, in deciding this case, did not hold that the privilege of neutral reportage was forfeited because the article did not report the accusations in an accurate and disinterested manner. Instead it concluded that the privilege was unavailable because Mr. Ciaffoni, the accuser, was not "a public figure already embroiled in a public controversy . . . ." A. 40a. As pointed out in the original Petition, no other court has restricted the privilege of neutral reportage in this fashion.

3. The Post-Gazette adequately preserved its constitutional challenge to the award of punitive damages.

In the trial court, the Post-Gazette specifically asked that the jury be instructed that, "in arriving at an award of damages, you must be careful not to go beyond fair compensation for the actual injury caused to the plaintiffs, since to do so would pose a threat to the legitimate interest of freedom of speech and of the press which are protected by the Constitution." A. 62a, n. 25. It also asked for an instruction that "imposing punitive damages in an improper case, or imposing excessive damages upon a defendant in a proper case, would pose a threat to the legitimate interests of freedom of speech and of the press which are protected by our Federal Constitution." A. 63a, n. 25. In both cases, the Post-Gazette cited as its authority *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). In both cases, the requested instruction was denied.

If further evidence of the preservation of this issue were needed, it is found in the lengthy treatment of the constitutional implications of punitive damages in the majority opinion of the Superior Court. *See* A. 43a-59a. As noted earlier, the Superior Court had no problem dismissing arguments it deemed to be waived. Judge Montgomery's dissent, moreover, was directed, in large part, to this precise point.[1]

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[1] Respondents suggest that Judge Montgomery raised this issue "*sua sponte.*" Brief in Opposition, p. 13, n. 17. There is simply no basis for this statement.

Finally, respondents suggest that the Post-Gazette failed, in the court below, to cite "the due process or excessive fines provisions of the United States Constitution" on the issue of punitive damages. Brief in Opposition, p. 14. This argument fails to recognize, however, that citation to the first amendment necessarily entailed, in this case, the notion of due process. Absent the due process clause of the fourteenth amendment, neither the first amendment nor the eighth amendment would have *any* applicability to state court proceedings. *See Near v. Minnesota*, 283 U.S. 697, 707 (1931); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 462 (1947). As the Post-Gazette noted in its original Petition to this Court, the protections of the first, eighth and fourteenth amendments are merged, in this context, "into a single constitutional concept." Petition, p. 21.

Conclusion

The Petition for Writ of Certiorari should be granted.

Respectfully submitted.

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